No. 1 5 4 4 6 (In Admiralty)

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH M. TRIHEY, Administrator
of the Estate of Maria G. Muna,
deceased, et al,

Appellants,

vs.

TRANSOCEAN AIR LINES, INC.,
a corporation, et al,

Respondents.

APPELLANTS' REPLY BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION
HON. THURMOND CLARKE, JUDGE

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I

RES IPSA LOQUITUR APPLIED

Although in the trial court Transocean denied that res ipsa applied, nowhere does it flatly deny it here. It says there is a "dearth of authority" (p. 15), but ignores Appellants' authorities (Op. Br. pp. 22-25). The language quoted from Smith v. Penna. Central Air Lines, 76 Fed. Supp. 940, is pure dictum found in a case where the court actually applied the doctrine. Of the eight cases cited by Transocean (p. 17) which did not apply the doctrine, only one involved a common

carrier plane crash, Wilson v. Colonial Air Transport, 180 N.E. 212 (Mass.), decided back in 1932. The others were decided 1943 or earlier, except Cudney v. Mid-Continent Air Lines (Mo.) 254 S.W. 2d 662, which did not involve a crash. Even the Cudney case states it is now generally accepted that the doctrine applies as against a common carrier under other circumstances, and points out that it "has been recently applied to the unexplained disappearance of a commercial airliner from Yakutat, Alaska to Seattle", citing Haasman v. Pac. Alaska Air Express (100 Fed. Supp. 1, aff'd. as Beckman v. Des Marias, 198 Fed. 2d 550 (CA-9)). We cited the Beckman and Haasman cases in our opening brief as persuasive authority, but Transocean has ignored them.

Slick concedes (its Br., p. 7) that res ipsa applies as against a common carrier, but argues that the doctrine does not apply as against Slick. Such argument essentially is based upon the difference between Transocean and Slick in their relationship to the passengers aboard the ill-fated aircraft, not upon any difference between them in the probabilities involved. Accordingly, we submit that such argument is unsound. By law, Slick (like Transocean) was under an affirmative duty to inspect N 90806 and maintain it in airworthy condition (Civil Air Regulations [C.A.R.] §18.30 et seq.). By contract, Slick was under a like duty (R. 45).

True, the measure of Transocean's duty as a carrier

was one of utmost care. But if the probabilities exist that a DC-6 airplane does not, in the ordinary course of things, crash unless there has been a failure to inspect, service or maintain it properly, res ipsa should apply against the maintenance firm the same as the air carrier. In Woods v. Kansas City, etc. R. Co., 134 Kan. 755, 8 Pac. 2d 404, a passenger was given the benefit of res ipsa as against two railroads, one which owned the car and the other which cared for it. Even if such failure was only contributory to the crash under the probabilities, the result should be the same. Other cases supporting the general principle cited by us (Op. Br. pp. 16-21) have not been answered, and Slick's cases are readily distinguishable on their facts.

II

THE TRIAL COURT DID NOT APPLY THE DOCTRINE

The statement by the trial judge that res ipsa did not apply constituted more than "remarks" as Transocean says (p. 14). The Court itself referred to it three separate times in terms of "ruling" (R. 90), concluding with "I didn't ask to hear from defense counsel because I thought you wouldn't quarrel with the court's ruling." (Italics added.) Of course a ruling during trial may be subject to a motion to reconsider, but unless expressly changed by the court it is fair to assume

it stands, as it here was fairly intended to stand, as an Order made to control the case.

In San Diego Gas & Elec. Co. v. U. S., (CA-9) 174 Fed. 2d 92, 94, this Court stated:

> "' * * * This judicial comment is in effect a finding that the evidence adduced, taken at its face value, cannot support an inference either of negligence or of a violation of warranty. The last and concluding thought in the comment is " * * * the record shows no basis for liability." This ruling, as would be a formal finding to the same effect, is clearly erroneous.'"

III

WITH RES IPSA, APPELLANTS WERE ENTITLED TO JUDGMENT

Transocean's argument to the contrary is that res ipsa in admiralty is a "watered down version" which does not require an explanation of the cause of the accident (p. 17). How much weight is to be given the inference begs the question where as here the trial judge ruled that it didn't apply. The real questions are (1) whether the Court prejudicially erred in so ruling, and (2) whether the inference plus the other proofs in the record make the findings and judgment "clearly erroneous". We submit that the answer should be "Yes" where as here

Respondent offered no evidence to explain the cause of the crash. In Bergen v. U. S. (CA-9) 222 Fed. 2d 949 (1955), Plaintiff was a passenger of the Alaska Railroad, a Government instrumentality, at the time the car in which he was riding derailed and turned over. The District Court gave judgment for defendant on the ground that there was no showing of negligence. Held, reversed. The Court states (p. 950):

> "The cause of the wreck we do not know. * * * However, we believe that this was clearly a case of an instrumentality and events solely within the control of the defendant and a case for the application of res ipsa loquitur. The burden of going forward on negligence was upon defendant, and the plaintiff's abortive attempt to prove the cause of the wreck, we hold, did not remove this burden."

And in Austerberry v. U. S. (CA-6) 169 Fed. 2d 583, a suit in admiralty arose out of explosion on a coast guard vessel. Libellant relied upon res ipsa loquitur and went on to show by an expert witness that there were leaks found in the gas line which could cause fumes to accumulate in the bilge. The Government's expert said differently. The trial court found no negligence and gave judgment accordingly. Held, reversed. The Court states:

"In admiralty, the doctrine of res ipsa loquitur is applied (citations) * * * (T)here is a complete absence of any explanation for the explosion other than one caused by fumes escaping from the leaking tank and the exposed gas line. Further, there is no evidence of regular inspection of the tank or the bilges. From the considerable body of evidence in the case relating to these conditions and happenings, it is our conclusion that the circumstances of the explosion and the proofs in the case established the negligence of appellee, under the doctrine of res ipsa loquitur."

The instant case shows numerous acts of negligence as against both respondents (Op. Br. pp. 33-49). Some, Respondents have not even replied to. Others are simply glossed over. For example, Transocean says that Babb "completely overhauled" the auto pilot on June 2, 1953. He did no such thing. Slick should have done the work required on the auto pilot, but ignored the squawk. When the airplane arrived at Oakland, Transocean's mechanic Babb cleared the squawk by overhauling the altitude control unit only (R. 239), this despite the fact that he didn't check to see what gave rise to the trouble. He admitted that it could have been due to the flight

gyro, which was not checked (R. 230). At the time of the accident the amplifier of which this vital unit is a part had exceeded its authorized operating time (Op. Br. 48). Even the work that Babb did lacked required records (C. A. R., §18.20) and double inspection (C. A. R., §52.45).

In Chutuk v. So. Cal. Gas Co., 218 Cal. 395, 399, the Court states:

> " * * * If complaints had been made and no attention had been paid to them, such a fact might constitute additional evidence of the negligence of the defendant; but the fact that no complaints had ever been made relative to the situation would have no tendency to prove affirmatively that care had been exercised on the part of the defendant. And the same principle would apply with reference to the average length of the life of the gas pipe. If its age limit had expired, that fact might well be an item tending to show lack of care; but because the pipe was generally still in good, serviceable condition has no tendency to prove that in the circumstances present herein the defendant was not guilty of negligence."

As to the excessive scheduling and pilot fatigue,

Transocean's answer is likewise erroneous and incomplete. That it was good practice for a passenger airline flying trans-Pacific to change crews at Wake Island was testified to by Transocean's Vice-President, William L. Keating, and such testimony was not limited to two pilot crews as Transocean says (p. 12) (cf. R. 746 and Op. Br. pp. 43-44). Further, Transocean wholly ignores the expert testimony of its own pilot, Captain Buckalew, and of Captain Tracy corroborative of this. Yet on N 90806 Transocean worked the same crew straight through -- both ways. Likewise as to a written pre-flight check list, while this is usually completed and delivered to ground personnel it was omitted prior to last departure of the aircraft from Wake Island. Such omission was contrary to Transocean's operations manual and law (Op. Br. 44-45). Indeed, Transocean never even furnished its pilots with a proper cockpit check list, as required by law (Op. Br. p. 46).

These are only some of the proven deficiencies. Can it be said that this record showed Transocean exercised the utmost care for its passengers, to safely carry and deliver them?

Respondents say the airplane was airworthy -- yet it crashed. Transocean says (p. 22) it is entitled to the presumption that its deceased pilots used ordinary care -- yet Transocean's duty was to use the utmost care and this blankets not only its pilots but each and every other phase of its operation.

It is not enough for Transocean to say (p. 21), "(I)t is common knowledge that aircraft have disappeared without apparent cause." In just such a case this court applied res ipsa and gave judgment against the air carrier (Haasman v. Pac. Alaska Air Express, (100 Fed. Supp. 1, aff'd. as Beckman v. Des Marias, 198 Fed. 2d 550 (CA-9)). Nor is it persuasive for Transocean to blame flying saucers, guided missiles and the like (p. 21), as to which there is not a shred of evidence in this record.

IV

THE BAGGAGE, ETC. LOSS

Transocean says (p. 28) we have cited no responsible authority on this point. We thought we had (Op. Br. p. 53). But we add the thought expressed so aptly by Dean William L. Prosser, 37 Cal. L. R. 183, 222:

> "It is surely a highly anomolous distinction, and a very strange preference of property values over human safety, which puts the burden of proof upon the carrier when it damages the passenger's trunk (citations), but not when it injures the man. No one has ever justified such a distinction, and no one, to the knowledge of the writer, has

ever tried."

CONCLUSION

We submit that the judgment in favor of Respondents Transocean and Slick should be reversed and the cause remande on the issue of damages.

Respectfully,

A. J. BLACKMAN

Attorney for Appellants.